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No. 90-1416

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

WALTER M. WOLAK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed prejudicial error in failing to instruct the jury, in connection with the charge of possession of a firearm by a previously convicted felon, on the defense of temporary innocent possession.

2. Whether the district court abused its discretion in excluding evidence of a government witness's 12-year-old felony conviction.

3. Whether the prosecutor engaged in misconduct during her opening statement by referring to a witness as an "ordinary citizen."

4. Whether the district court erred in finding that an out-of-court statement made by petitioner's friend was not an "excited utterance" under Fed. R. Evid. 803(2).

5. Whether the district court should have suppressed statements made by petitioner to an investigating officer.

6. Whether the sentence enhancement provision of 18 U.S.C. 924(e) creates a separate criminal offense that must be alleged in the indictment and proved beyond a reasonable doubt at trial.

7. Whether petitioner's sentence was in excess of the maximum penalty authorized under 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 923 F.2d 1193.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1991. The petition for a writ of certiorari was filed on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of possession of a firearm by a previously convicted

felon, in violation of 18 U.S.C. 922(g)(1). The district court enhanced petitioner's sentence under the Armed Career Criminal Act, 18 U.S.C. 924(e)(1), because he had three prior convictions for "violent felon[ies]" or "serious drug offense[s]" within the meaning of Section 924(e)(2). Petitioner was sentenced to 20 years' imprisonment and three years' supervised release. The court of appeals affirmed petitioner's conviction, but remanded for resentencing. Pet. App. 1-14.

1. The evidence at trial showed that on May 5, 1989, petitioner and John Pruitt were in the check-out line at Steve's Party Store in Hamtramck, Michigan. Petitioner and Pruitt disagreed over their respective places in the line. Claiming that Pruitt had cut in front of him, petitioner drew a pistol from under his shirt and pointed it at Pruitt's head. A struggle ensued, the police were called, and petitioner was arrested. Petitioner admitted at the scene that he had drawn the weapon. Pet. App. 2.

2. Petitioner raised numerous claims on appeal, including challenges to the district court's evidentiary rulings. Petitioner argued that the district court incorrectly precluded him from cross-examining Pruitt on Pruitt's 12-year-old felony conviction for criminal sexual conduct. The court of appeals rejected that claim, finding that the district court's ruling was consistent with Fed. R. Evid. 609(b). Pet. App. 3. The court further rejected petitioner's contention that the prosecutor committed misconduct by referring to Pruitt as an "ordinary citizen" during the opening statement, when she knew that the district court would not allow petitioner to introduce Pruitt's prior conviction. The court of appeals found that the prosecutor's characterization of Pruitt was not improper. *Id.* at 7. The court of appeals likewise rejected petitioner's claim that a hearsay declaration of petitioner's friend, that "[t]hey arrested [petitioner] and that he didn't have a gun, the other guy did," should have been

admitted as an excited utterance under Fed. R. Evid. 803(2). The court of appeals found that the statement was properly excluded because it was neither spontaneous nor shown to be the product of the declarant's first-hand observation. Pet. App. 4.[1]

Petitioner also challenged the admission of statements he made to the investigating police officers prior to the issuance of *Miranda* warnings. The two officers responded to the disturbance at the party store. One talked to Pruitt and the other to petitioner. Neither officer had any prior knowledge of the details of what had transpired. Officer Schamanski asked petitioner what had happened, and petitioner responded that he was afraid that Pruitt was going to assault him so he pulled a gun. The court of appeals rejected petitioner's claim that his statements should be suppressed. Even though Schamanski acknowledged that it was "probably true" that petitioner would not have been allowed to leave the store before the police spoke to him, the court of appeals did not "see this as the type of 'custody' envisioned by *Miranda*." Pet. App. 5. The court explained that petitioner's argument, carried to its logical conclusion, "would require officers to announce *Miranda* warnings to everyone present immediately upon arriving at a possible crime scene before they knew what happened or before they could ask any questions." *Id.* at 5-6, citing *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977). The court of appeals was similarly unpersuaded by petitioner's argument that he was not timely informed of the government's intention to introduce his statement. Pet. App. 6.

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[1] Petitioner also claimed that he should have been allowed to call as a witness a long-time friend who would testify to overhearing a conversation showing Pruitt's bias. The court of appeals rejected that claim, Pet. App. 3-4, and petitioner does not seek review of the court of appeals' ruling on that issue.

Petitioner also asserted that the district court committed reversible error in failing to give his requested instruction on temporary innocent possession of a firearm. See *United States* v. *Singleton*, 902 F.2d 471, 472-473 (6th Cir.) (describing the defense and collecting cases), cert. denied, 111 S. Ct. 196 (1990). The court of appeals believed that the district court erred in failing to give the instruction, but found the error to be harmless:

> It was clear right from the government's opening statement that the theory of prosecution was that [petitioner] came into the store with the firearm already in his possession. This made the trial a credibility battle. Both [petitioner] and Pruitt testified, as well as independent witnesses who corroborated Pruitt's version of the incident. It borders on the absurd to suggest that, if the jury believed that the only time [petitioner] had the pistol was when he forcibly took it away from Pruitt, they would have returned a guilty verdict.

Pet. App. 9.

Finally, petitioner attacked his 20-year sentence, claiming that: (1) the district court improperly sentenced him under 18 U.S.C. 924(e) without a proper arraignment or jury trial; (2) the district court improperly sentenced him to a term in excess of that authorized by Congress; and (3) the district court erred in departing upward from the Sentencing Guideline range. The court of appeals rejected the first claim, finding that Section 924(e) does not create a separate criminal offense, but is simply a sentence enhancement provision that need not be pleaded in the indictment nor proved beyond a reasonable doubt at trial. Pet. App. 10. The court of appeals also found that by its express terms, Section 924(e) requires a 15-year mandatory minimum sentence, but sets no maximum term of imprisonment. The court of appeals agreed with petitioner, however, that the district

court had impermissibly departed upward from his Sentencing Guideline range, and remanded for resentencing. Pet. App. 11-14.

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the district court's failure to charge the jury on the defense of temporary innocent possession was not harmless error. According to petitioner, the failure to give such an instruction in a firearms case warrants automatic reversal where there is "any" evidence, no matter how slim, to support the defense. The court of appeals, however, properly employed a harmless error analysis. The jury was charged that petitioner could not be convicted unless he had "knowingly" possessed the handgun—*i.e.*, "voluntarily * * * and not because of mistake or accident, or other innocent reason." C.A. App. 264. Had the jury accepted petitioner's claim that his only "possession" of the gun consisted of wrestling it away from a potential assailant, then the jury would have found that petitioner acted for the "innocent reason" of self-defense. While a specific temporary innocent possession instruction would have been appropriate here, the instructions as given did not in any way prevent the jury from considering petitioner's defense theory. The jury simply rejected petitioner's theory in the face of contrary testimony from other witnesses.

2. Petitioner also asserts (Pet. 15-18) that the district court abused its discretion in excluding evidence of Pruitt's 12-year-old conviction for criminal sexual conduct. Rule 609(b), Fed. R. Evid., expressly states, however, that:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction,

> whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

The 10-year time limit exists because "practical considerations of fairness and relevancy demand that some boundary be recognized." Fed. R. Evid. 609(b) advisory committee note. In this case, petitioner failed to make the required showing that the probative value of the conviction substantially outweighed its prejudicial effect. C.A. App. 177-178. And, as the court of appeals noted (Pet. App. 3), other witnesses and petitioner's own admission showed that petitioner drew the gun. This fact-specific claim warrants no further review.

3. In a related claim, petitioner asserts (Pet. 17-18) that the prosecutor's reference in her opening statement to Pruitt as "an ordinary citizen" was deceptive given her knowledge that Pruitt's criminal record would be excluded. To the contrary, nothing in the prosecutor's description would suggest that Pruitt had led a blameless life in all respects. In any event, reversal for prosecutorial misconduct requires a showing that the misconduct resulted in an unfair trial. *United States* v. *Hasting*, 461 U.S. 499, 507(1983); *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982). The prosecutor's comment, even if improper, surely did not rise to that level.

4. Petitioner next claims (Pet. 19-20) that the district court abused its discretion when it refused to admit the hearsay statement of Richard Carter, who was not called to testify, as an "excited utterance." See Fed. R. Evid. 803(2). Petitioner proffered a witness who would testify that Carter came into a bar across the street from Steve's Party Store and said "[t]hey arrested [petitioner] and that he didn't have a gun, the other guy did." Pet. App. 4. As the court of appeals correctly observed, that statement was not an excited

utterance under Fed. R. Evid. 803(2). Carter's observation about petitioner's arrest was not the sort of unreflective spontaneous outburst envisioned by the rule. See Fed. R. Evid. 803(2) advisory committee note (describing the rule as applying to statements made under "a condition of excitement which temporarily stills the capacity of reflection"). Nor did petitioner lay a proper foundation as to the source of Carter's knowledge of the event. On the state of the record set out by petitioner, Carter might well not have witnessed the event (Pet. App. 4), adding another layer of hearsay to which no exception applies.

5. Petitioner also asserts (Pet. 20-23) that his admission to Officer Schamanski was the product of custodial interrogation and that he was therefore entitled to be advised of his Fifth Amendment rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner's argument fails because there was no "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983), quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977). Officer Schamanski spoke to petitioner in the back of the store where the altercation occurred, asking petitioner what had happened. Petitioner described the fight and claimed that he pulled a gun because he was concerned that Pruitt "was going to beat him up." C.A. App. 114-115. Officer Schamanski testified that he probably would not have allowed petitioner to leave the store, because "[t]here was some kind of altercation and we had to find out what it was because we were sent there for a reason." C.A. App. 121. He explained that his purpose was to conduct an investigation of what had occurred and that he did not focus on petitioner as a central suspect. C.A. App. 129-130. At the time petitioner was questioned, he plainly was not subject to restraints comparable to those associated with a formal arrest. At most, he was subject to a brief investigative

stop to allow the officers to quickly confirm or dispel their suspicions. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Such stops are not subject to the requirements of *Miranda*. See *Berkemer* v. *McCarty*, 468 U.S. 420, 438-440 (1984).

6. Petitioner contends (Pet. 23-26) that the Armed Career Criminal Act, 18 U.S.C. 924(e), creates a separate offense that must be indicted by the grand jury and submitted for determination to the trier of fact. That argument is contrary to the language of Section 924(e), which establishes that the Armed Career Criminal Act is a sentence enhancement provision for violations of Section 922(g) rather than a separate offense.[2] The courts of appeals have consistently rejected that argument. See, *e.g.*, *United States* v. *Affleck*, 861 F.2d 97, 98-99 (5th Cir. 1988), cert. denied, 489 U.S. 1058 (1989); *United States* v. *Dickerson*, 857 F.2d 414, 416-418 (7th Cir. 1988), cert. denied, 490 U.S. 1023 (1989); *United States* v. *Brewer*, 853 F.2d 1319, 1322-1327 (6th Cir.), cert. denied, 488 U.S. 946 (1988); *United States* v. *Hawkins*, 811 F.2d 210, 217-220 (3d Cir.), cert. denied, 484 U.S. 833 (1987). Review by this Court is accordingly unwarranted.

7. Finally, petitioner asserts (Pet. 26-29) that Section 924(e) establishes a 15-year *maximum* penalty, and that the district court erred in sentencing him to more than 15 years' imprisonment. Once again, the plain language of the statute

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[2] Section 924(e) provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any [state or federal] court * * * for a violent felony or a serious drug offense, or both * * *, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years [without possibility of probation, parole or suspended sentence].

18 U.S.C. 924(e).

refutes petitioner's claim. Section 924(e) refers to a sentence of "not less than" 15 years, clearly indicating that a 15-year sentence is the floor, not the ceiling, for an enhanced sentence. No court of appeals has accepted the position put forth by petitioner. See, *e.g.*, *United States* v. *Lego*, 855 F.2d 542, 546 (8th Cir. 1988) (upholding 18-year sentence); *United States* v. *Blannon*, 836 F.2d 843, 845 (4th Cir.) (upholding 23-year sentence), cert. denied, 486 U.S. 1010 (1988); *United States* v. *Jackson*, 835 F.2d 1195, 1197 (7th Cir. 1987) (upholding sentence of life imprisonment), cert. denied, 485 U.S. 969 (1988). The issue does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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